MALAYSIAN REPORTS

SIM CHIO HUAT v. WONG TED FUI

[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo) and Salleh Abas F.J.) May 11 & October 22, 1982]

[Kuching – Federal Court Civil Appeal No. 8 of 1981]

Contract – Building Contract – Time essence of contract – Provision for forfeiture – Waiver – Election to treat contract as continuing – Extra work – Delay in delivery of site – Claim for damages – Interest.

In this case the appellant a housing developer undertook to deliver houses to be erected by him for the respondent within six months in the case of two units of double-storey detached houses and twelve months in the case of two units of terrace houses from the date of approval of the plans. It was stipulated that time shall be of the essence of the contract. The agreement contained no provision for extension of the delivery period nor any provision as to alterations and additional works. The appellant was unable to deliver the houses in time and there was a delay in the delivery. During the course of constructing the houses at the request of the respondent the appellant carried out extra work at a total cost of $5,008.00 and also incurred certain expenses amounting to $881.00 on behalf of the respondent. The appellant sued for the price of the extra work and expenses. The respondent denied liability and counterclaimed a sum of $28,800 as liquidated damages and also general damages for the failure of the appellant to deliver the houses in accordance with the stipulated periods. The appellant's reply to the respondent's counterclaim was that the respondent was not entitled to the damages claimed because there had been a waiver and estoppel on the part of the respondent. The trial judge Seah J. allowed a sum of $4,424.00 on the appellant's claim for extra work and a further sum of $651.50 for additional expenses, making a total of $5,075.50. The learned trial judge upheld the respondent's counterclaim and assessed the liquidated damages under the contract at $28,176.00. He also allowed a further sum of $2,400.00 as general damages for the failure to construct a temporary house for the respondent to live in whilst the old house was being demolished and the new houses were being constructed. The appellant appealed against the decision of the learned trial judge on the counterclaim while the respondent cross-appealed against the decision because the trial judge had not ordered interest on the damages nor costs in favour of the respondent.

Held: (1) in this case as time was provided to be of the essence of the agreement, the stipulated periods within which the houses had to be delivered to the respondent became an essential condition of the agreement. Failure by the appellant to fulfil this condition entitled the respondent to have an option of treating the agreement either (a) as having been repudiated and dismissing the appellant or (b) as still continuing;

(2) in this case the respondent did not choose to treat the contract as having been repudiated. By allowing the delivery dates to pass by and by acquiescing in the work continuing under the agreement and indeed by ordering extra work to be done for each of the houses, for which the agreement made no provision, the respondent must be held to have waived his right to rescind the agreemend on account of repudiation and also the right to treat himself as discharged therefrom. He must be deemed to have elected the agreement as still continuing;

(3) the stipulation as to time in the agreement ceased to be of the essence of the agreement, not because of the omission by the respondent to invoke Clause 23 of the agreement, but because of his acquiescence in and allowing the work to continue under the agreement;

(4) in cases where an agreement contains no clause for extension of time for completion, the acts of prevention by the employer whether authorised by the contract or whether in breach of it or whether the prevention is a cause of part or of the whole of the delay invalidate the liquidated damages clause because by such acts time becomes at large and consequently there is no date from which damages could run and therefore no damages could be claimed;

(5) in this case the respondent could not succeed in his counterclaim for damages under Clauses 20 and 21 of the contract as he was responsible for the delay in ordering extra work and for late delivery of the site;

(6) although the respondent failed in enforcing clauses 20 and 21 because of the late delivery of the site to enable the appellant to commence construction work immediately and also by the extra work ordered by the respondent, such failure did not prevent him from claiming unliquidated damages and the learned judge was right in awarding $2,400/– as unliquidated damages against the appellant;

(7) interest is a matter of discretion for the learned trial judge and in this case there was no reason to interfere with his discretion.

Cases referred to:

(1) *United Scientific* v. *Burnley Council* [1978] A.C. 904, 940 and 944.
(2) *Trollope and Colls Ltd.* v. *N.W. Hospital Board* [1973] 2 All E.R. 260.
(3) *Clydebank Engineering & Shipbuilding Co. Ltd.* v. *Don Jose Ramos Yzqierdo Y. Castenada & Ors.* [1905] A.C. 6.
(4) *Holme* v. *Guppy* (1838) 3 M & W 387; 150 E.R. 1195.
(5) *Thornhill* v. *Neats* (1860) 8 C.B. (N.S.) 831; 141 E.R. 1392.
(6) *Russell* v. *Sa Da Bandeira* (1862) 13 C.B. (N.S.) 149; 143 E.R. 59.
(7) *Westwood* v. *Secretary of State for India* (1863) 7 L.T. 736.
(8) *Dodd* v. *Churton* [1897] 1 Q.B. 562.
(9) *Murdoch* v. *Lockie* (1897) 15 N.Z.L.R. 296.
(10) *Meyer* v. *Gilmer* (1899) 18 N.Z.L.R. 129.
(11) *Wells* v. *Army & Navy Co-operative Society* (1902) 86 L.T. 764.
(12) *Perini Pacific* v. *Greater Vancouver Sewerage* (1966) 57 D.L.R. (2d) 307.
(13) *Jones* v. *St. John's College, Oxford* (1870) L.R. 6 Q.B. 115.
(14) *Tew* v. *Newbold-on-Avon School Board* (1884) 1 C. & E. 260.
(15) *Sattin* v. *Poole* (1901) Hudson's B.C. 4th Ed. Vol. 2 p. 306.
(16) *Yeoh Kim Pong Realty Ltd.* v. *Ng Kim Pong* [1962] M.L.J. 118, 126.

FEDERAL COURT.

Patrick Tan for the appellant.
Chew Pok Oi for the respondent.

Cur. Adv. Vult.

Salleh Abas F.J. (Judgment of the Court, delivered by Lee Hun Hoe C.J. (Borneo)): In this appeal the facts are as follows:

By an agreement entered on May 15, 1969 the respondent sold 89 housing lots to the appellant for a total consideration of $301,000.00 of which $133,000.00 was paid in cash and the balance of $168,000.00 was to be set off against the price of four houses which the appellant was required to build for the respondent on lots 1762, 1772, 1763 and 1771. The houses which were to be erected on lots 1762 and 1772 were two units of double-storey detached houses, whilst the houses to be built on lots 1763 and 1771 were two units of terrace houses.

Under clause 8 of the agreement the appellant undertook to deliver these houses in a state of completion, within six months in the case of the two double-storey detached houses and twelve months in the case of the two units of terrace houses from the date of the approval of their plans, drawing and specification by the Kuching Rural District Council (KRDC). State of completion was defined by clause 9 to mean the issuance by KRDC of certificates of fitness for occupation in respect of these houses.

Clause 24 stipulated that time wherever specified shall be of the essence of the agreement.

Under clauses 20 and 21, it was agreed that if the appellant failed to deliver these houses within the agreed time, he would be liable to pay to the respondent a sum of $1,080.00 per month in respect of the double-storey detached houses and a sum of $600.00 per month in respect of the two terrace houses and this liability would continue until the houses were delivered in a state of completion, i.e. until certificates of fitness were issued.

The agreement also made a provision for a forfeiture clause – clause 23 – in the following terms:

"23. Notwithstanding anything herein contained to the contrary, it is hereby agreed that if the Developer [appellant] defaults in paying the full sum of $133,000/– (Dollars One hundred and thirty-three thousand only) to the Owner [respondent] within six (6) months from the date stipulated in Clause 3 (b) hereof and/or *if the Developer [appellant] abandons the performance of the present Agreement or fails in execution of the construction work in the course of erection as aforesaid*, then thereupon this Agreement shall *ipso facto* be null and void and all sums of money paid hereunder by the Developer [appellant] shall be forfeited to the Owner [respondent] and in such circumstances the Developer [appellant] shall have no claim whatsoever for the work done or for the cost of materials." (the emphasis is ours)

The agreement contained no provision for the extension of the delivery period, nor any provision as to alterations and additional works.

The appellant, however, was unable to deliver these four houses in time. In respect of the two double-storey detached houses on lots 1762 and 1772 the delivery dates were March 16, 1971 and April 4, 1971. The delivery date for the two terrace houses was July 9, 1971. He did not deliver these houses by their agreed delivery dates, but delivered them all only on September 9, 1972. He was thus late by 17 months and 20 days in respect of the first double-storey detached house and by 19 months and 2 days in respect of the second double-storey detached house and by 13 months and 27 days in respect of the two terrace houses.

During the course of constructing these four houses at the request of the respondent the appellant carried out extra work in respect of each of them for a total cost of $5,008.00 and also incurred certain expenses amounting to $881.00 on behalf of the respondent.

When sued for the price of extra work and the expenses of $881.00, the respondent denied liability and counterclaimed a sum of $28,800.00 as liquidated damages under clauses 20 and 21 of the agreement and also general damages because of the failure of the appellant to deliver the houses in accordance with the stipulated periods.

The appellant's reply to the respondent's counterclaim was that the respondent was not entitled to the damages claimed because there had been a waiver and estoppel on the part of the respondent.

Seah J., before whom the trial took place, allowed a sum of $4,424.00 as the appellant's claim for extra work and a further sum of $651.50 as the appellant's additional expenses incurred on behalf of the respondent, thus making a total of $5,075.50. The learned trial judge upheld the respondent's counterclaim and assessed the

liquidated damages under clauses 20 and 21 at $28,176.00. He also awarded a further sum of $2,400.00 as general damages under clause 10 of the agreement for failing to construct a temporary house under clause 10 to enable the respondent to live in it whilst his old house was being demolished and the new houses were being constructed. Thus the total damages awarded was $30,576.00.

The appellant appealed against the decision of the learned trial judge on the counterclaim whilst the respondent cross-appealed against the decision because the learned trial judge ordered no interest on the sum of $30,576.00 allowed for counterclaim nor costs in favour of the respondent.

Time being of the essence:

In modern law of contract *prima facie* a stipulation as to time is not of the essence of a contract, unless the parties agree that it be so. (See Lord Simon of Glaisdale in *United Scientific* v. *Burnley Council.*[1]) In this case as time was provided to be of the essence of the agreement, the stipulated periods within which these four houses had to be delivered to the respondent became an essential condition of the agreement. Failure by the appellant to fulfill this condition would entitle the respondent to have an option of treating the agreement either (a) as having been repudiated and dismissing the appellant; or (b) as still continuing. (See 9 *Halsbury's* Laws of England, 4th ed. para 538, page 370).

In this case obviously he did not choose to treat the agreement as having been repudiated. By allowing the delivery dates to pass and by acquiescing in the work continuing under the agreement and indeed by ordering extra work to be done for each of these houses, for which the agreement made no provision, the appellant must be held to have waived his right to rescind the agreement on account of repudiation and also the right to treat himself as discharged therefrom. He must be deemed to have elected the agreement as still continuing.

Forfeiture provision under clause 23:

In his submission before us, counsel for the appellant said that as the respondent had not exercised his right to forfeiture under clause 23, time was no longer of the essence of the agreement. In our view this submission is completely misconceived. If clause 23 was invoked, the consequence would be disastrous to the appellant, as he stood to lose all that he had paid for under the agreement and would also be deprived of making any claim for the work done and materials supplied. In any case this clause, in the circumstances of this case, if invoked by the respondent, would not be applicable because the appellant neither abandoned the performance of the agreement, nor failed in the execution of the construction work – the two conditions precedent to the application of this clause. What the appellant failed to do in this case is not in the execution of the construction work, but in meeting the delivery time set for each of the four houses. In our view the stipulation as to time in this agreement ceased to be of the essence of the agreement, not because of the omission by the respondent to invoke clause 23, but because, as we have said earlier, of his acquiescence in, and allowing the work to continue under the agreement.

Case of the appellant:

It must be observed here that although counsel for the appellant in the court below submitted that extra time was needed to carry out extra works, it had never been the case of the appellant that the delivery dates of these houses should accordingly be extended. Indeed, if such had been his case, the agreement having provided for no extension of time clause the case would be bound to fail. *Trollope and Colls* v. *N.W. Hospital Board.*[2] The case for the appellant simply consists of waiver and estoppel as crystallised in his counsel's submission in the court below and before us. His counsel submitted that in view of the extra work for which amended plans were submitted to the KRDC for approval after the houses were completed, the respondent must be deemed to have waived the deadline for the houses and –

> "it follows that he had waived clauses 20/21 of the Agreement .....
>
> Having waived his right the defendant (respondent) is now estopped from claiming damages under clauses 20/21."
>
> (pages 47-48 of Appeal Record)

We agree with the submission in so far as the waiver of the delivery dates is concerned but we do not agree that this waiver also constitutes a waiver of his right to claim liquidated damages under clauses 20 and 21. (*Clydebank Engineering & Shipbuilding Co. Ltd.* v. *Don Jose Ramos Yzquierdo Y. Castaneda & Ors.*[3]) A waiver by the respondent of the delivery periods is no more than his election not to treat the agreement as having been repudiated. He still regarded the agreement as still subsisting and in no sense could

such a contract be interpreted as indicating a waiver to claim damages.

Question of Damages:

We now come to the question whether the respondent should succeed or not in his claim for damages, under clauses 20 and 21. In dealing with this question we can do no better than be guided by the statement of the law in *Hudson's Building and Engineering Contracts*, 10th ed., at p. 624, which is as follows:

"It has been seen that, for the purpose of treating the contract as repudiated, in the rare cases where time is of the essence, the contract time for completion may cease to be applicable for a variety of reasons, including the ordering of extras or other interference or prevention by the employer. In the case of damages, it is equally obvious that where the reason is some act of the employer or his architect or engineer preventing completion by the due date, it cannot be the intention of the parties that liquidated or other damages should be calculated from that date even if the act, such as ordering extras, is not a breach of contract. Liquidated damages stipulated for at a rate for each day or week of delay in completing the works must begin to run from some definite date. It follows, therefore, that *if the date in the contract has for some such reason ceased to be the proper date for the completion of the works, and no contractual provision exists for the substitution of a new date, there is in such a case no date from which liquidated damages can run and the right to liquidated damages will have gone.* This, rather than solicitude for the contractor, is the reason for the provision usually known as the extension of time clause." .....

(The emphasis is ours)

The learned author gives a list of cases in which the court refused damages and another list in which it allowed them. The first list of cases in which damages were refused consists of:

(1) *Holme* v. *Guppy*(4)
(2) *Thornhill* v. *Neats*(5)
(3) *Russell* v. *Sa Da Bandeira*(6)
(4) *Westwood* v. *Secretary of State for India*(7)
(5) *Dodd* v. *Churton*(8)
(6) *Murdoch* v. *Lockie*(9)
(7) *Meyer* v. *Gilmer*(10)
(8) *Wells* v. *Army & Navy Co-operative Society*(11)
(9) *Perini Pacific* v. *Greater Vancouver Sewerage*(12)

The second list of cases in which damages were allowed is:

(1) *Jones* v. *St. John's College, Oxford*(13)
(2) *Tew* v. *Newbold-on-Avon School Board*(14)
(3) *Sattin* v. *Poole*(15)

Amongst the conclusions reached by the learned author after considering these cases is that in cases where an agreement contains no clause for extension of time for completion, the acts of prevention by the employer whether authorised by the contract or whether in breach of it or whether the prevention is a cause of part or of the whole of the delay invalidate the liquidated damages clause because by such acts in the words of Parke B. in *Holme* v. *Guppy (supra)* and Lord Denning M.R. in *Trollope and Colls* (*supra*) "the time becomes at large". Consequently there is no date from which damages could run and therefore no damages could be claimed.

In the present case, not only did the agreement contain no extension clause it also contained no clause authorising extra work. This extra work must at least have caused part of the delay though it might not have caused the whole delay. Applying the principle stated above, we are of the opinion that clauses 20 and 21 became invalidated and that no damages should have been allowed under them.

Delay by extra work:

The learned trial judge held that the principle of *Dodd* v. *Churton* (*supra*) did not apply to the facts of this case, because he said:

"..... the question to be decided is whether the additional works which the landowner [respondent] requested to be done would make it impossible or impracticable for the contractor [appellant] to complete the work within the stipulated time. ..... On the basis of the evidence before the court I cannot say that these additional works requested by the defendant [respondent] would inevitably result in a delay in the plaintiff [appellant] completing all the four houses within the stipulated time."

(page 65 of the Appeal Record)

With respect we do not agree, because there is unchallenged evidence given by the appellant that in February, 1971 the respondent stopped the work on the second double storey detached house, i.e. the one built on lot 1772 after piling work had been completed and ground beams laid because he objected to the size of one of the rooms of the house, which was later enlarged. Further, because of the request for extra work on the other double storey detached house, the appellant was unable to proceed with this extra work until the supervisor of Borneo Housing Corporation (BHC) approved it. BHC had an interest in the construction of these four houses because the respondent applied for housing loans from BHC in order to

finance the sale of these houses to other people. He said:

"I needed a loan from BHC because when I wanted to sell it would be easier for me."

(page 39 of the Appeal Record)

What then is the principle enunciated in *Dodd* v. *Churton* (*supra*) which the learned trial judge held to be inapplicable to the facts of the present appeal.

Dodd v. *Churton* is definitely based on *Holme* v. *Guppy* (*supra*) and in both these cases, the law applicable was stated to be that found in *Comyns' Digest*, Condition L (6). Parke B., who decided *Holme* v. *Guppy*, said:

"... and there are clear authorities, that if the party be prevented, by the refusal of the other contracting party, from completing the contract within the time limited, he is not liable in law for the default (1 Roll. Abr. 543; Com. Dig. Condition L (6)). ..... The plaintiffs were therefore left at large; and consequently they are not to forfeit anything for the delay. ....."

Lord Esher M.R. in *Dodd* v. *Churton* said, at p. 566:

"... The principle is laid down in Comyns' Digest, Condition L (6), that, where one party to a contract is prevented from performing it by the act of the other, he is not liable in law for that default; and, accordingly, a well recognised rule has been established in cases of this kind, beginning with *Holme* v. *Guppy*, to the effect that, if the building owner has ordered extra work beyond that specified by the original contract which has necessarily increased the time requisite for finishing the work, he is thereby disentitled to claim the penalties for non-completion provided for by the contract. The reason for that rule is that otherwise a most unreasonable burden would be imposed on the contractor. Then this further complication arose."

It is clear therefore that the principle enunciated by *Dodd* v. *Churton* is nothing more than the application of the principle stated in *Comyns' Digest*, Condition L (6) to extra work ordered by an employer in a building contract.

The passage in which the words "impossible or impracticable" were used in the judgment of Lord Esher M.R. in *Dodd* v. *Churton* (*supra*) and in that of Lord Denning M.R. in *Trollope and Colls* (*supra*) should not be interpreted like a statute to mean that the extra work must be of such a nature that it must delay work, otherwise the builder would not be excused. These words in our view cannot mean more than that such extra work necessarily delays the completion of the work or that it occasions its delay as used in the headnote of *Dodd* v. *Churton* and in the judgment of Lord Pearson *in Trollope and Colls* when his Lordship rejected Lord Denning's judgment in the case to the effect that *Dodd* v. *Churton* was not an authority for the court to fix a new completion date where the agreement makes no such provision as to extension of time.

The test which should guide us in resolving the question of extra work and delay of completion is simply this: Did the extra work delay the completion of the building and nothing more?

In *Dodd* v. *Churton* (*supra*) the builder was late by 27 weeks of which only two weeks were attributable to the extra work ordered by the employer. Yet the Court of Appeal affirming the decision of the county court judge did not allow the employer to claim damages in respect of the 25 weeks, of which he was in no way to blame. It follows therefore that the principle derived from this case is that where an employer hinders the completion of work within time, it is immaterial whether the hindrance is the whole cause or only part of the cause of delay; he cannot afterwards claim damages unless there is a time extension clause. We think that *Dodd* v. *Churton* is applicable to the present appeal and that the damage under clauses 20 and 21 of the agreement should not be awarded. In fact the present appeal is stronger because the extra work was not authorised by the agreement, whereas in *Dodd* v. *Churton* such work was ordered pursuant to a clause in the contract to the effect.

Delay in delivery of site:

It is also the case of the appellant that the delay was caused by the respondent having delivered the site rather late, thus leaving little time for the appellant to complete the work. The learned trial judge in reference to this submission said:

"The plaintiff [appellant], however, did not produce any satisfactory evidence at the trial to support this contention and I rule that this defence is entirely void of merits." (page 63 of the Appeal Record)

With respect we are unable to agree. According to the appellant, whose testimony on this issue was not disputed, the first double-storey detached house, i.e. the one on lot 1762, was to be built very close to the respondent's old house. The appellant dared not do piling work on the site towards the construction of this new house until the respondent had moved out of his old house

as it is too risky. The respondent only did so, according to his own evidence on December 15, 1970 and the house was finally demolished in the following month, i.e. January, 1971. As the date of completion (delivery) was fixed for this double-storey detached house to be on March 16, 1971 (six months from the date of the approval of the plan by KRDC which was on September 17, 1970), the appellant had in fact only three months to complete the construction. The shortening of the completion period with the consequent delay in completing the house must necessarily be due to the delay by the respondent in moving out of his old house. As the appellant was required under clause 7 of the agreement to carry out the work immediately and without "undue delay" after the housing plans had been approved by KRDC, it must necessarily follow that there must be a reciprocal obligation on the part of the respondent to move out of his old house also immediately and without undue delay. Otherwise the performance becomes impossible. His failure to do so immediately after approval of the plans definitely hindered the completion of the house within the agreed period of six months. A delay of three months in the context of six months period of completion is too long to entitle the respondent to this claim for damages. Thus we cannot see how the evidence on this point could be said to be unsatisfactory and devoid of any merits. Surely this is a case in which the principle stated in Comyn's Digest, Condition L (6) which became the basis of the decision in *Holme* v. *Guppy* (*supra*) and *Dodd* v. *Churton* (*supra*) applies. At the risk of repetition we restate the principle in that where one party to a contract is prevented from performing it by the act of the other, he is not liable in law for the default.

It is true that the respondent's old house only related to the site of the first double-storey detached house and not to the sites of the other three houses, but it must be remembered that these four houses were to be build together and with respect to the other houses, whose lots were sold to the appellant, it is a matter of common-sense that the delay would certainly affect the work's time-table or programmes of the other three houses as well.

For the reasons given above, i.e. extra work and delay in handing over the site, we feel that the appellant should succeed in the appeal regarding damages under clauses 20 and 21.

Section 56 of Contract Act:

Counsel for the appellant submitted to us that by virtue of section 56 (3) of the Contract Act, the respondent was not entitled to any compensation unless he had given notice to the appellant that he intended to claim damages. Since he did not issue the requisite notice he was not therefore entitled to the compensation.

This submission is so far as it was based on the Contract Act was misconceived because the Act only applied to Sarawak from July 1, 1974, long after the agreement in this case was entered into, i.e. on May 15, 1969.

However, the rules contained in section 56 of the Contract Act are not different from the position arrived at in common law. *Yeoh Kim Pong Realty Ltd.* v. *Ng Kim Pong.*[16] The position is this: If in a contract in which time is of the essence, a party fails to perform it by the stipulated time, the innocent party has the right either to rescind the contract, or to treat it as still subsisting. If he treats it either expressly or by conduct as still continuing, the contract exists but time ceases to be of the essence and becomes at large. Consequently he cannot claim the liquidated damages under the contract unless there is a provision as to the extension of time. However, this cessation can be revived and so time can be restored to be of the essence by the innocent party serving a notice to the party in default giving a new date of completion. (See *Hudson*, pp. 604 & 612). If this is done there would be a date from which liquidated damages could be calculated. In the present appeal, at no time did the respondent give notice to the appellant. Hence clauses 20 and 21 cannot be enforced.

However, even if the contract contains a time extension clause or even if an innocent party serves a notice on the party in default requiring the latter to complete the work by a certain date, damages are not as a matter of course awarded in favour of the employer. Only in circumstances in which the employer or his agent is in no way to blame for the delay would the court be willing to allow damages. If the employer contributes to the delay by ordering extra work or is guilty of the delay in delivering possession of the site, or of any other cause no damages could be claimed. (See *Hudson* pp. 624-628).

In the circumstances of this case, there is no way in which the court could uphold the res-

pondent's counterclaim for damages under clauses 20 and 21 of the agreement, as the respondent was responsible for the delay in ordering extra work and late delivery of the site.

Damages under clause 10 of the Agreement:

Although the respondent failed in enforcing clauses 20 and 21 because of the delay occasioned by the late delivery of the site to enable the appellant to commence construction work immediately and also by the extra work ordered by the respondent, such failure does not prevent him from claiming unliquidated damages. (See *Hudson*, p. 633).

The learned trial judge found that the appellant was in breach of clause 10 of the agreement because he did not build a temporary house required under this clause in order to house the respondent whilst the new houses were being constructed. Although a hut for the purpose was built, the respondent did not agree to live in it as it was very small with hardly sufficient room to accommodate his large family and as a result he went to live with his sister at St. Nicholas School canteen for two years. He paid his sister $200.00 a month for occupation of the canteen. The learned trial judge therefore assessed the damages at $2,400.00 for two years at the rate of $100.00 per month. Counsel for the appellant submitted that as the money paid by the respondent was according to his sister (DW 1) meant for water and electricity charges and that it was paid to her gratuitously, the respondent suffered no damage at all and therefore the learned trial judge should not have awarded the sum of $2,400.00 as unliquidated damages against the appellant.

With respect to counsel, we disagree with him. We think that the learned trial judge was right. The fact that the money was paid without his sister asking for it, does not detract from the fact that it was paid because of his sense of obligation arising out of the occupation of the school canteen. What she did with the money, whether paid for water and electricity charges or even treated it as her pocket money, is immaterial. There was breach of the agreement and the respondent was entitled to damages. We think that the appeal on this point fails.

Cross-appeal:

As to the cross-appeal by the respondent, we do not think that there is much substance in it. As we have allowed the appellant's appeal on the liquidated damages under clauses 20 and 21, the cross-appeal is only limited to the unliquidated damages of $2,400.00. Interest is always a matter of discretion of the learned trial judge. Although he gave no reason why he did not order interest on the sums awarded for the appellant's claim and the respondent's counterclaim, we are not prepared to interfere with his discretion, as we do not think that he was in error. As regards costs it is also a matter of discretion and should follow the event.

Conclusion:

The order we would propose in this case is therefore as follows:

(a) the appellant's appeal against the liquidated damages under clauses 20 and 21 of the agreement is allowed;

(b) the appeal against unliquidated damages of $2,400.00 is dismissed.

(c) the respondent's cross-appeal is also dismissed.

(d) the appellant is entitled to costs of the proceedings before this court, and in the court below.

Order accordingly.

Solicitors: *Yong & Co.; Chan, Jugah, Wan Ullok & Co.*

PUBLIC PROSECUTOR v. LAU KEE HOO

[F.C. (Suffian L.P., Wan Suleiman F.J., Salleh Abas F.J., Abdul Hamid F.J. and Abdoolcader J.) September 29 & October 25, 1982]
[Kuala Lumpur – Federal Court Criminal Reference No. 7 of 1982]

Criminal Law and Procedure – Mandatory death sentence for offence under Internal Security Act, 1960 – Whether unconstitutional – Deprivation of life and liberty in accordance with law – Provision of offences and penalties necessary in order to stop or prevent subversion – Equality before the law – Discretion of Attorney-General to charge person under one or other law – Fact that Court has no alternative does not make mandatory death sentence unconstitutional – Federal Constitution, arts. 5(1), 8(1), 121(1) & 149(1) – Internal Security Act, 1960, s. 57(1)(b).

Constitutional Law – Whether mandatory death sentence unconstitutional – Federal Constitution, arts. 5(1), 8(1), 121(1) & 149.

In this case the respondent had been charged with having under his control in a security area without lawful excuse or authority ammunition contrary to section 57(1) of the Internal Security Act, 1960 which carries a manda-